DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU
DALAM NEGERI JOHOR DARUL TA'ZIM, MALAYSIA
RAYUAN JENAYAH NO: MT(6) 42S-34-2009

PENDAKWA RAYA

LWN

PRABDHIAL SINGH A/L DARDARA SINGH

JUDGMENT

GUNALAN A/L MUNIANDY, JC

[1] This is an appeal by the Public Prosecutor against the decision by the Sessions Court Judge (SCJ) of Johor Bahru to acquit and discharge the Accused/Respondent at the end of the prosecution case without his defence being called. The accused faced two charges under s. 11(a) of the Anti-Corruption Act, 1997 (ACA 1997) both for receiving a gratification of RM1,500.00 on different dates from the complainant (SP2). The learned SCJ found that a prima facie case had not been made out essentially on the premise that the evidence adduced by the prosecution to prove the vital ingredients of the offence charged was not credible.

[2] The main ground of appeal was that the SCJ had failed to invoke the statutory presumption under s. 42 of the ACA 1997 upon a proper judicial evaluation of the witnesses' evidence and the relevant circumstances. Further, that he had concentrated only on the First Charge without providing adequate reasons for his finding on the Second Charge.

[3] It was common ground that in order to establish the charges the following ingredients had to be proved:

(i) The accused is an agent (I would add 'of Kempas Edible Oil Sdn Bhd' (KEO))

(ii) The accused obtained RM1500 from the SP2;

(iii) The gratification of RM1500 was obtained corruptly; and

(iv) The gratification was to determine the contract for the supply of workers between Zulfida enterprise (ZE) and Kempas Edible Oil Sdn Bhd (KEO)"."

[4] As rightly submitted by defence counsel, the law does not merely require the existence of evidence to establish the ingredients of the offence but it also requires that the evidence be fully evaluated to determine whether it is credible enough for defence to be called. Proper inferences from the facts and evidence need to be drawn by the trial judge at this stage before making his finding. The test to be applied is accurately laid down in P.P v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 [Per Gopal Sri Ram, JCA] as follows:

"[8] For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:

(i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I

> prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted.".

[5] Defence counsel submitted that as the SCJ had considered the evidence carefully before concluding that a prima facie case had not been made out the decision should not be disturbed. The findings of fact by the SCJ, it was argued, were based on clear evidence, credibility and favourable inferences that could be drawn from the facts. The learned TPR, on the other hand, submitted that the SCJ had erred in holding that the evidence adduced had failed to prove the essential ingredients of the charges, particularly because the presumption under s. 42 of the ACA 1997 applied against the accused.

[6] In order to determine whether the learned SCJ had erred or misdirected himself in making the findings in regard to the two charges the evidence and facts relied upon by him and the inferences drawn need to be examined.

First Charge:

[7] This charge concerns payment of RM1,500.00 allegedly made to the accused by SP2 on 17.10.2002. SP2 alleged that this was part of a series of regular monthly payments made to the accused since October 2001. He alleged that on the accused's demand relating to contract workers supplied by SP2 to the company (accused's employer) he had been paying RM1,000.00 per month since October 2001 followed by RM1,500.00 per month to the accused subsequently. These are serious allegations and this evidence was important to lend support to the veracity of the present allegation.

[8] From the Grounds of Judgment (GOJ), the SCJ found that SP2 had contradicted himself on a vital issue, viz., the date of the first payment

to the accused, when he admitted in cross-examination that it was in October 2002 through an Affin Bank's cheque. His earlier evidence was that he had begun to make payment of RM1,500.00 per month to the accused in October 2001. The SCJ was also unconvinced by SP2's explanation for not being unable to produce any evidence of payment by cheque in respect of the earlier payments, especially that he only had the above cheque as proof. As rightly concluded by him, such evidence would be easily available by making an application to the bank concerned for the relevant statements of account which would have supported SP2's allegation. It is for this reason, amongst others, that he doubted the truthfulness at SP2's evidence on this issue. This, to my mind, is a fair conclusion as there appeared to be withholding of evidence without any credible justification. Based on the reasons given, he was not in error in arriving at this conclusion. The learned DPP submitted that supporting evidence in respect of the previous payments was unimportant and irrelevant as this charge only involved the present payment. But, in my view, this could not be so as the payment was allegedly one in a series of payments made by SP2 to the accused upon demand having been made several years ago. Hence, the current payment doesn't stand alone but is inextricably related to the series of payments. To be noted was the fact that this payment was by cheque being credited into accused's account. The accused could or could not have known of the deposit by the accused but there was no evidence either way. In the circumstances, proof of the previous payments was vital to establish that the said cheque was a gratification demanded and received by the accused. Thus, the learned SCJ's finding that the absence thereof had adversely affected SP2's credibility could not be considered erroneous.

[9] The delay of about two months in making a complaint to the Anti-Corruption Agency (ACA) after having informed the accused's superior (SP1) of payment of bribes to the accused by SP2 was considered unreasonable. The SCJ considered this an important fact as, if the allegation was true and there was already evidence, there was no reason for the matter not to be reported to the ACA for it to be promptly and properly investigated. Instead, SP1 appeared to be dealing with it in his own way and looking for evidence to ensure that the accused would be implicated. This despite SP2 informing him that he (SP2) had been paying bribes to the accused since November 1999 and there was no explanation why he had complained to SP2 only in August 2002. The SCJ found it

incredible for SP2 not to have done so much earlier when he had known all along since 1999 that the accused was never the person in authority in Kempas Edible Oil Sdn. Bhd ('KED') in relation to the termination or continuation of the contract that had been awarded to. In other words, he neither had reason to pay a gratification to avoid termination of the contract nor to fear reporting the matter to SP2. The SCJ rightly found this fact to adversely affect SP2's credibility in the absence of any credible explanation. He took into account the fact that SP2 was closely acquainted with the then head of KEO in Johor Bahru, one T.T. Rajah, who was the person in authority to whom SP2 could have easily complained.

[10] The SCJ also placed emphasis on the active role played by SP2 in procuring evidence against the accused and initiating this case against him through SP2. Of major concern was the delay of two months before reporting to the BPR for prompt investigation but instead asking SP2 to obtain evidence. Regarding the cheque dated 17.10.2002, which is the basis of the present charge, the SCJ held that this was not the evidence sought as it was created by SP2 who had also instructed him to admit having issued it to the accused. SP2's letter of complaint to KEO too was on the instruction of SP1 who needed the written complaint to refer the matter to his superior which, for no apparent reason, took 2 months. These facts, amongst others, were found by the SCJ to lead to suspicion about SP1's motives and doubts as to the truth of SP2's allegation and his credibility as well. As stated in the GOJ**,** SP1 had not only suggested that the cheque be issued but had also instructed SP2 to retrieve it from the bank as it didn't bear the accused's name. This conduct further strengthened the suspicion against SP1 and led the SCJ to infer that the whole plan was hatched by him to deliberately implicate the accused as SP1 had a history of conflict with the accused on the management of KEO.

[11] The above salient factors which were taken into consideration by the learned SCJ were based on relevant facts on record. Hence, the findings of fact and inference made by him favourable to the accused cannot be regarded as being without basis or based on extraneous matters. His conclusion was simply that the mere depositing of a cheque into the accused's bank account at the instance of a third party, i.e. SP1, was not sufficient to draw a presumption under s. 42, ACA 1997. This was essentially due to the fact that SP2's evidence regarding the demand by

the accused for gratification and the ensuing negotiation was highly suspect and far from credible. As the SCJ had taken a correct approach in subjecting this crucial evidence to a maximum evaluation in line with established principles [P.P v. Mohd Radzi bin Abu Bakar (supra)] before arriving at his findings, the decision with respect to the present charge cannot, in my view, be regarded as erroneous or a misdirection.

The Second Charge

[12] The issue arising was whether from the fact of payment of a sum of RM1,500.00 ('marked notes') on the day of entrapment it could be presumed under s. 42 of ACA 1997 that the accused had received the money corruptly as a gratification for the purpose set out in the charge?

[13] Apart from the payment of RM1,500.00 in cash to the accused by SP2 during the trap, the vital evidence led to establish this charge was the telephone conversation between them to set up the appointment which was recorded by the BPR. [See transcript – Exhibit P11A]. A most significant fact to emerge from this conversation was that there was no demand whatsoever from the accused for any payment. This was admitted by SP2 in cross-examination. On the contrary, it was apparent that it was SP2 who was anxious to meet the accused and make payment whereas the accused did not appear keen to meet the former. This was a circumstance inconsistent with SP2's allegation that the accused had demanded regular monthly payments. The tenor of the conversation did not give this impression at all.

[14] It was rightly submitted by Respondent's counsel that a striking fact arises from the story of SP2 which appears to be in conflict with the purpose of payment on the day of the incident. According to SP2, he made a monthly payment of RM1,500.00 at the accused's request and the first payment for October 2002 was on 17.10.2002. To claim that the payment of another RM1,500.00 on that day was also as gratification for the same month was clearly illogical and incredible. This was especially so when there was, admittedly, no demand for payment. This was certainly in line with the trial court's finding that the s. 42 presumption was not applicable as there could be other inferences from the evidence of payment. The SCJ

was, presumably, referring to inferences favourable to the accused. According to counsel for Respondent, who also appeared as defence counsel in the trial court, the SCJ, upon hearing SP2's admission that the accused had not demanded any payment, directed that further cross-examination was not required on this incident. Even though this is not recorded in the notes, it is perhaps borne out by the SCJ's stand that the s. 42 presumption was not applicable as the evidence was open to other inferences, not necessarily implicating the accused. In any event, the SCJ felt that SP2's credibility was wholly demolished ("tergugat"). Granted that the learned SCJ had not advanced sufficient grounds why he dismissed this charge outright without invoking the said presumption despite there being undisputed evidence that money had passed to the accused. However, sufficient grounds existed on record for dismissing SP2's evidence as being incredible and unreliable. This factual finding was neither manifestly wrong nor perverse for interference by the appellate court.

[15] It is trite law that even if there is misdirection or non-direction by the trial court in its finding, the appellate court would not interfere with the finding if there is sufficient evidence to support the same. In Tunde Apatira v. P.P [2001] 1 CLJ 381, it was held, inter alia, that:

> "So it comes to this. As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in Alcontara a/l Ambross Anthony v. Public Prosecutor [1996] 1 CLJ 705 exemplifies the general rule, while that in Khoo Hi Chiang v. Public Prosecutor [1994] 2 CLJ 151 illustrates the exception.".

In Ishak Shaari & other appeal v. PP [2003] 3 CLJ 843, it was held:

> "Whatever it is what remains to be considered is whether there is sufficient evidence to support the conviction in a particular case and if there is, that would be a good ground for holding that there was no miscarriage or failure of justice. The same consideration applies to the misdirection at the end of the case. Therefore, we

> conclude that the misdirection on the standard of proof in a trial which has been conducted in substantial compliance with the CPC is curable under s. 422 of the CPC provided that there is sufficient evidence to support the conviction, as the error has not occasioned a failure of justice.".

Both the above cases involve convictions by the trial court where there was a possible misdirection which, it was held, did not affect the correctness or legality of the decision as there was overwhelming evidence in support thereof. The principle would similarly apply to an acquittal, as in the instant case, where there was sufficient evidence to justify the trial court's findings of fact, particularly on credibility of the material witnesses, despite reasons for the findings not being clearly and adequately expressed in the GOJ. Further, in the instant case, the question of misdirection, leave alone miscarriage of justice, did not arise at all as the SCJ had found, based on a thorough evaluation of the material evidence, that there was insufficient evidence to support this charge.

[16] The learned SCJ, in his concluding remarks in finding that a prima-facie case had not been made out, stated as follows [page 20, Appeal Record]:

> "Keterangan SP2 adalah meragukan dan kredibilitinya tergugat dan mahkamah tidak menerima keterangannya. Terdapat keraguan yang ditimbulkan di dalam kes pihak pendakwaan dan juga timbul kemungkinan yang lain. Maka anggapan di bawah seksyen 42 Akta Pencegahan Rasuah tidak ditimbulkan ke atas OKT.".

The above remarks apply to the present charge as well. The SCJ could, thus, not be said to have not directed himself or addressed his mind to the evidence adduced on this charge. This was particularly so when he said that other inferences arose such that the s. 42 presumption could not be invoked. Viewing the evidence in its totality from all angles, I held the view that this finding was neither incorrect nor baseless.

Presumption – S. 42, ACA 1997

[17] Respondent's counsel submitted at length on the applicability of the above presumption in every case where there is passing of money from the giver to the accused. As rightly pointed out, some leading cases seem to suggest so in every such instance. Counsel submitted that there should exist evidence of prior agreement or negotiation and not mere receipt of gratification for the presumption to be raised as otherwise, it could lead to absurdities and be open to abuse. In other words, that this provision should be interpreted purposefully and not literally and that the presumption should only be invoked if the facts and circumstances indicate that the accused had asked for or demanded a gratification. In P.P v. Jamil b. Mahmod & Anor [1998] 4 MLJ 681, it was held:

> "Given the trap money recovered from the first respondent was not challenged and that the first respondent was a person serving under a public body, the next step should have been an evaluation of the total evidence in its entirety to determine if the first respondent had knowingly, inadvertently or unwillingly accepted the money.".

[18] I agree that the mere passing of trap money would not be enough to incriminate the receiver by resorting to s. 42 as the next step to evaluate the entire evidence to ascertain the real intention of the parties is imperative. The SCJ in this case was unwilling to raise the presumption merely on the evidence of the money having been received by the accused upon considering SP2's credibility and the prevailing circumstances. Amongst others, he considered the long history and relationship between the accused and SP2, including the fact that the accused had helped SP2 when the latter was in financial difficulties. That SP2 used to face such difficulties and sorely needed the help of SP1 to maintain his financial status was undisputed. SP2 agreed that he had used a cheque (Exhibit P12) as collateral to borrow money from a money lender. Exhibit P12 was signed and issued by the Accused and handed over to the BPR during investigations. It can be safely surmised that this was the point that the SCJ was alluding to when he held that the evidence was open to other inferences and not necessarily that the accused had intentionally received a gratification.

[19] I found merit in the argument of defence counsel pertaining to how s. 42 should be interpreted, supported by P.P v. Jamil b. Mahmod & Anor (supra) and P.P v. Chettuvellu a/l Nani [2007] 6 MLJ 621, which was in gist as follows:

> "v. Section 42 of ACA 1997 requires that the prosecution should prove that the accused accepted or agreed to accept the amount as a gratification. "Accept" means to take or receive with a consenting mind. It is, therefore, upon the prosecution to prove not only the passing of the money into the hands of the accused, but also that he took it with a consenting mind. This would necessitate proof of either an agreement to accept prior to the actual acceptance or of his consent to accept the same as gratification at the time the money was offered.".

It is to be noted that s. 42 states 'gratification' not money. Money is among the forms of gratification. Hence, the necessity to prove that the money or any other form of reward/inducement that was received was meant as a gratification and herein lies the need to prove agreement or negotiation prior to the actual acceptance or consent to accept. This is in accord with the view expressed in PP v. Chettuvelu a/ Nani (supra) regarding the scope and extent of the s. 42 presumption.

Decision

[20] The finding of the learned SCJ that a prima facie case had not been established on both charges was premised mainly on his observation and evaluation of the credibility of the key witnesses, especially the complainant. He had subjected the evidence to a maximum evaluation, as can be seen throughout the GOJ, to determine whether it was credible enough to raise the said presumption and sustain the charges. This was indeed the correct approach set out in s. 173 (h) of the Criminal Procedure Code. He makes a clear and specific finding of fact that he was unable to accept the evidence of SP2 as the basis of proof in this case as his credibility was seriously in doubt. He emphasized that he had watched SP2's demeanour and the way he answered the questions put forth by the prosecution and the defence. This is exactly the point in several leading

authorities that propounded the principle that the appellate court should be slow in disturbing factual findings of this nature, save in exceptional circumstances, where the trial court had the 'audio-visual' advantage of directly observing the demeanour of the witnesses. Likewise, in the instant case, I did not find any valid and cogent reasons to interfere with the findings of the learned SCJ on the question of prima facie case as it essentially turned on the credibility of the principal witnesses.

[21] The role and function of appellate court in reviewing decisions of a trial court arrived at from findings of fact are indeed limited in scope and extent and interference is confined to instances of possible miscarriage of justice by the latter. The appellate court, not having seen and heard the witnesses, is not in a position to substitute its own findings of fact for that of the trial court as stressed clearly in P.P v. Mohd Radzi bin Abu Bakar (supra) at page 406 as follows:

> "Now, it settled law that it is no part of the function of an appellate court in a criminal case — or indeed any case — to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court.".

Further that,

> "….. To put the matter beyond any doubt, we state that it is not the function of this court to make primary findings of fact. Of course, we may examine the record to see if the trial court drew the proper inferences from proved or admitted facts.".

In Renal Link (KL) Sdn. Bhd. v. Dato' Dr. Harnam Singh [1997] 3 AMR 2430 at 2439, the same judge [Gopal Sri Ram, JCA (as he then was)] said

> "Unless we, as a Court Appeal, are convinced that there was no judicial appreciation of evidence by the trier of fact, or that the audio-visual advantage reserved to a trial judge had been missed or that the findings made do not accord with the probabilities of the case taken as a whole, it will not be open to us to intervene and upset the findings made by a trial judge.".

[22] In view of the foregoing, as there was no misdirection by the trial judge, whether in law, fact or principle, and he had appreciated the onus of proof borne by the prosecution to make out a prima facie case, I found no merit in this appeal. There were no grounds to alter the decision that had been properly arrived at from an evaluation of the facts and evidence. I, therefore, dismissed the appeal in respect of both charges and upheld the order of acquittal and discharge.

Dated: 06th August 2010

(GUNALAN A/L MUNIANDY)
Judicial Commissioner
High Court
Johor Bahru.

For the Prosecution: Encik Abd Ghafar Abd Latif
Timbalan Pendakwa Raya
Pejabat Penasihat Undang-Undang
Negeri Johor.

For the Respondent: Encik Jerald Gomez
Tetuan Jerald Gomez & Associates
Peguambela dan Peguamcara
Kuala Lumpur.